

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective June 28, 2016.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts of the case as presented in the prior Board decisions are incorporated herein by reference. The relevant facts are as follows.

Appellant filed an occupational disease claim (Form CA-2) on December 12, 2008 alleging injury as a result of repetitive activity in her federal employment as a mail processing clerk. OWCP accepted the claim for bilateral flexor tenosynovitis, right tunnel radial neuropathy, right ulnar neuropathy, right carpal tunnel median neuropathy, left upper extremity overuse syndrome, and cervical strain. Appellant received intermittent wage-loss benefits on the supplemental rolls commencing February 14, 2009.

As of October 1, 2009 appellant was working four hours per day. The record indicates that on September 4, 2010 she was offered and she accepted a full-time, light-duty position. As of October 25, 2010 appellant began intermittently working less than eight hours per day and claimed compensation for the remaining hours.⁴ OWCP paid her compensation for wage loss for the claimed hours.

Appellant stopped work on December 6, 2012. OWCP referred appellant for a second opinion examination by Dr. Robert Smith, a Board-certified orthopedic surgeon. In a report dated February 21, 2014, Dr. Smith, provided a history of injury and results on physical examination. He reported that appellant had a relatively benign orthopedic examination, with no specific adverse soft tissue abnormalities or specific and focal neurological deficits. Dr. Smith opined that she was certainly capable of returning to full-time employment. He further wrote that there was no requirement for any future medical treatment related to this claim such as physical therapy, acupuncture, surgery, or injections.

The record indicates that on February 10, 2014, the employing establishment offered appellant a light-duty job as a sales solution team member. The position was a full-time sedentary position that involved light data entry and telephone duties. The effective date of the offer was March 13, 2014.

³ Docket No. 08-1136 (issued May 20, 2009) (the Board set aside October 1 and March 7, 2007 decisions denying appellant's claim for a schedule award, and remanded the case for further development on the issue of permanent impairment); Docket No. 11-0287 (issued August 19, 2011) (the Board affirmed the denial of appellant's claim for a recurrence of disability commencing September 23, 2009); Docket No. 13-0882 (issued August 23, 2013) (the Board set aside a November 6, 2012 decision and remanded the case for further development to determine whether OWCP had properly found an overpayment of compensation based upon appellant's pay rate).

⁴ The compensation claimed generally was 1.5 hours per day, although appellant's work hours varied and intermittently she worked eight hours and did not claim compensation.

In a report dated March 10, 2014, Dr. Scott Fried, an osteopath, provided results on examination. He indicated that appellant still had employment-related residuals. Dr. Fried wrote that appellant would like to try the modified job, but he would prefer that it begin as a part-time position.

Appellant returned to full-time, light-duty work on March 12, 2014. She continued to receive wage-loss compensation for partial disability on the supplemental rolls based upon an informal loss of wage-earning determination.

By letter dated April 3, 2014, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits. It indicated that Dr. Smith had opined that employment-related residuals had ceased, and this represented the weight of the medical evidence. OWCP afforded appellant 30 days to submit additional evidence or argument.

On April 16, 2014 counsel submitted a letter arguing that the proposed termination was inappropriate. He asserted that there was a conflict in the medical evidence between Dr. Fried and Dr. Smith.

OWCP determined that there was a conflict in the medical evidence as to whether appellant continued to have residuals of an employment-related condition. Appellant was referred to Dr. Andrew Sattel, a Board-certified orthopedic surgeon. In a report dated July 8, 2015, Dr. Sattel opined that appellant was best suited for light-duty work. He wrote that no additional diagnostic workup or physical therapy was indicated. Dr. Sattel noted mild findings for carpal tunnel, but no surgery was warranted.

By decision dated September 17, 2015, OWCP denied authorization for a nerve block for the right upper extremity. It found the weight of the evidence did not support the proposed treatment as necessary. On September 28, 2015 appellant, through counsel, requested a hearing before an OWCP hearing representative.

By letter dated September 18, 2015, OWCP advised appellant that it proposed to terminate authorization for physical therapy. It found the medical evidence of record did not establish the need for continuing physical therapy.

Appellant no longer received wage-loss compensation benefits on the supplemental rolls as of October 9, 2015. OWCP noted that appellant no longer had a loss of wage-earning capacity as she had earnings as a caregiver in addition to her federal employment earnings.

In a decision dated October 19, 2015, OWCP terminated authorization for physical therapy. It found the weight of the medical evidence rested with Dr. Sattel.

On October 22, 2015 appellant, through counsel, requested a hearing before an OWCP hearing representative. A hearing was held on January 19, 2016, with respect to both the denial of authorization for a medical procedure, as well as termination of authorization for physical therapy.

By decision dated March 31, 2016, the hearing representative set aside the September 17 and October 19, 2015 decisions. She found there was inadequate evidence of record to establish

that Dr. Sattel had been properly selected as a referee physician to resolve the conflict of medical opinion. The case was remanded to OWCP.

On remand OWCP selected Dr. Noubar Didizian, a Board-certified orthopedic surgeon, as a referee physician. In a report dated June 14, 2016, Dr. Didizian reviewed the statement of accepted facts, provided a history and results on examination. He also reviewed medical records. Dr. Didizian reported that wrist examination revealed no evidence of flexor or extensor tenosynovitis, and Tinel's test was negative. He found there was no evidence of right radial neuropathy, or cervical strain. As to carpal tunnel syndrome, Dr. Didizian opined the examination was normal, and appellant's right carpal tunnel median neuropathy had resolved. He further opined that a diagnosis of left upper extremity overuse syndrome had resolved, and there was no evidence of right ulnar neuropathy or brachial plexopathy. Dr. Didizian opined that appellant was capable of returning to full-time work with no restrictions.

By decision dated June 28, 2016, OWCP terminated appellant's wage-loss compensation and medical benefits. It found that the special weight of the medical evidence was represented by Dr. Didizian.

On July 11, 2016 counsel requested a hearing before an OWCP hearing representative. A hearing was held on October 13, 2016. Counsel argued that OWCP should have issued a pretermination notice prior to terminating compensation on June 28, 2016.

By decision dated December 9, 2016, OWCP's hearing representative affirmed the June 28, 2016 termination decision. She found that OWCP did not have to issue a new pretermination notice, and Dr. Didizian represented the special weight of the medical evidence.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation. After it has been determined that an employee has disability causally related to his or her employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.⁵

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination and resolve the conflict of medical evidence.⁶ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁷

⁵ *Elaine Sneed*, 56 ECAB 373 (2005); *Patricia A. Keller*, 45 ECAB 278 (1993); 20 C.F.R. § 10.503.

⁶ 5 U.S.C. § 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

⁷ *R.C.*, 58 ECAB 238 (2006).

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁸

ANALYSIS

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits on June 28, 2016. Appellant's 2008 occupational disease claim was accepted for bilateral flexor tenosynovitis, right tunnel radial neuropathy, right ulnar neuropathy, right carpal tunnel median neuropathy, left upper extremity overuse syndrome, and cervical strain.

On February 21, 2014 appellant was seen by Dr. Smith, an OWCP second opinion physician. He reported that appellant had no specific soft tissue or neurological deficits and could return to full-time work. Thereafter on February 10, 2014 the employing establishment offered appellant a full-time, light-duty position. Appellant accepted this position and returned to work on March 12, 2014. Her treating physician, Dr. Fried opined, however, that appellant should begin work on a part-time basis.

OWCP initially issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits on April 3, 2014. However, based upon counsel's argument that a conflict existed in the medical opinion evidence between Dr. Smith and Dr. Fried, OWCP referred appellant to Dr. Sattel for an impartial medical evaluation. After OWCP denied authorization for a right upper extremity nerve block and terminated authorization for physical therapy, appellant requested a hearing before an OWCP hearing representative on October 22 2015. OWCP's hearing representative, however, found on March 31, 2016 that Dr. Sattel had not been properly selected as a referee physician to resolve the conflict of medical opinion. The case was remanded for a new impartial medical evaluation. OWCP referred appellant, a SOAF, and a list of specific questions to Dr. Didizian to resolve the conflict of medical opinion evidence.

In a report dated June 14, 2016, Dr. Didizian reviewed appellant's history of injury. He performed a physical examination and determined examination of appellant's wrists revealed no evidence of flexor or extensor tenosynovitis. Dr. Didizian also found no objective evidence of right radial neuropathy, or cervical strain. Appellant's Tinel's test was negative, and the remainder of his examination for carpal tunnel syndrome and median neuropathy was within normal limits. Dr. Didizian also noted that appellant's left upper extremity overuse syndrome had resolved. He, therefore, concluded that all of appellant's accepted conditions had resolved.

The Board finds that his report was based on a proper factual background, included detailed findings on physical examination, and offered a clear opinion that appellant's employment-related residuals and disability had resolved. Dr. Didizian's report was well reasoned and is entitled the special weight accorded to an impartial medical examiner and

⁸ *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

constitutes the special weight of the medical evidence. Therefore, OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits.⁹

On appeal counsel argues that OWCP should have issued another notice of proposed termination prior to terminating benefits on June 28, 2016.

In this case OWCP had previously issued a pre-termination notice dated April 3, 2014. The hearing representative, in affirming the June 28, 2016 decision, found that OWCP did not have to issue a new pretermination notice, citing OWCP's procedures. The procedure manual section cited by the hearing representative discusses the situation where a pretermination notice has been issued, but further development of the evidence is subsequently undertaken.¹⁰ It notes that a claims examiner should write a letter explaining to appellant the additional development, and an explanation that such development may result in termination of benefits. The hearing representative found that "should" is discretionary, and since "no second notice of proposed action" is required under the procedure manual or regulations, OWCP properly followed its procedures.¹¹

OWCP regulations at 10.541(b) provides that, if additional development of the evidence is undertaken following a notice of proposed termination of compensation, it does not provide another notice of proposed action. It "will either continue payment or issue a decision consistent with its prior notice."¹² The Board, therefore, finds that OWCP properly terminated appellant's wage-loss compensation and medical benefits, effective June 28, 2016.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective June 28, 2016.

⁹ See *M.P.*, Docket No. 17-0459 (issued July 12, 2017).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.7(e)(4) (February 2013).

¹¹ *Id.* provides: "An explanation should be provided that development may result in final termination of benefits with no second notice of proposed action," citing 20 C.F.R. § 10.541(b).

¹² 20 C.F.R. § 10.541(b).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 9, 2016 is affirmed.

Issued: January 5, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board